Office-Supreme Court, U.S.
FILED
JUN 1 1981
ALEXANDER L. STEVAS,
CLERK

80-2060

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No._____

IN THE MATTER OF JOHN D. RANDALL, SR.,

Petitioner,

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

For the Eighth Circuit

JOHN D. RANDALL, SR.
330 1st Street SE
Cedar Rapids, Iowa 52401
PRO SE

QUESTIONS PRESENTED

The case presents three questions. One question whether an Eighth Circuit Practioner under the rules of the Eighth Circuit is entitled to have the question of his disbarment heard en banc. The second whether a lawyer is entitled to due process of law and equal protection of the law in disciplinary proceedings. Third, whether in this disciplinary proceeding the Eighth Circuit Court of Appeals and the lower Federal Courts handled this proceeding in a manner which would entitle this Petitioner to invoke Rule 17-1(a) of this Court.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No._____

JOHN D. RANDALL,

Petitioner,

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

Petitioner John D. Randall, Sr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on January 21, 1981. Petition for rehearing denied on March 3, 1981.

CITATIONS TO OPINIONS BELOW

The portion of the Opinion of the United States Court of Appeals in the Eighth Circuit, relative to the disbarment of Petitioner, Division III, is printed in the Appendix D, p. 16. The Opinion of the Supreme Court of Iowa is Appendix H, P. 135. The Finding of

Fact, Conclusions of Law, and Recommendation of the Grievance Commission of the Supreme Court of Iowa, and Exception to Finding of Fact, Conclusions of Law, and Recommendation, is Appendix G, p. 101.

JURISDICTION

The decree of the United States Court of Appeals was entered January 21, 1981. Rehearing was denied March 3, 1981. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

There is a separate ground under which this Court should take cognizance of this matter. The Petitioner was denied discovery, was denied a de novo hearing and was denied a hearing en banc as is provided by Rule 2 of the United States Court of Appeals for the Eighth Circuit and the portion of Rule 17-1(a), of the Rules of the Supreme Court of the United States reading:

> "1(a) When a Federal Court of Appeals***, has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of

this Court's power of supervision."

QUESTIONS PRESENTED

The case presents three questions. One question whether an Eighth Circuit practioner under the rules of the Eighth Circuit is entitled to have the question of his disbarment heard en banc. The second whether a lawyer is entitled to due process of lawn and equal protection of the law in disciplinary proceedings. Third, whether in this disciplinary proceeding the Eight Circuit Court of Appeals and the lower Federal Courts handled this proceeding in a manner which would entitle this Petitioner to invoke Rule 17-1(a) of this Court.

STATUTES INVOLVED

Fourteenth Amendment, United States Constitution, Section 1:

"***Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law***"

RULES INVOLVED

Rule 6, United States Court of Appeals Eighth Circuit:

> "Procedure for the admission, suspension, and disciplining of an attorney shall be as prescribed in Rule 46 of the Federal Rules of the Appellate Procedure.***"

Rule 46(b):

> "Suspension or disbarment. When it is shown to the Court that any member of this Bar has been suspended or disbarred from practice in any other Court of record,***he will be subject to suspension or disbarment of the Court. A member shall be afforded an opportunity to show good cause, within such time as the Court shall prescribe why he should not be suspended or disbarred.***"

Rule 46(c):

> "Disciplinary power of the Court over attorneys. A Court of Appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it***"

Rule 2(a):

> "The Judges of this Court shall as provided in Title 28 U.S.C.A., Section 46, be assigned to sit upon the Court and its divisions of the Court direct. Cases and Controversies shall be heard and determined by a

Court or division of not more than three Judges***"(Emphasis supplied)

PROLOGUE

John D. Randall, Sr., is presenting this Petition for Writ of Certiorari Pro Se from the judgment of the Eighth Circuit Court of Appeals striking his name from the roll of attorneys licensed to practice before the Eighth Circuit. He is doing this Pro Se not because of any dissatisfaction with his Counsel, because his representation has been of the highest professional standard. However, in this Petition it will be necessary to critically examine the proceedings and comment on the Opinion. Considering the fact that the Panel of the Eighth Circuit has announced that the violation of an Ethical Consideration may subject a lawyer to disciplin at the election of the Court, it would be unfair to subject a lawyer who would expect to practice before the Eighth Circuit Court of Appeals to take a chance, that he might be displease the Court, and be subject to discipline for

the violation of one of the 138 Ethical Considerations.

STATEMENT OF THE CASE

The ethical infractions upon which the disbarment was based accurred in 1973. The cases relied on by the Courts and upon which the Courts based their judgment were handed down from 1974 to 1979.

Considering first the violation of EC 5-5 the drawing of the Will of Lovell Myers March 14, 1973. The Iowa Supreme Court had adopted the Code of Professional Conduct October 4, 1971, without minor change, without the Preamble. September, 1972, Mr. Lee Gaudineer described as "Staff Counsel Committee on Professional Ethics and Conduct, Iowa State Bar prepared an article in the Drake Law Review (September, 1972, issue) entitled "Ethics: The Grievance Commission." In that article and on page 116 Mr. Gaudineer described the difference between Ethical Considerations and Disciplinary rules, in the following language:

> "Within each Canon there were then to be statements of 'Ehical Considerations' representative of the objectives and principles a lawyer may rely upon for guidance. Lastly, within each Canon, there are statements of disciplinary rules which are mandatory."

There were no Iowa cases prior to 1973, which would in any way reflect that the preperation of a Will under the circumstances existing would havebeen unethical.

The background of the drafting of the Will would negative the thought of unethical conduct. Lovell Myers, seven years younger than Petitioner, came to Petitioner's office to persuade Petitioner to approve his telling his daughter and her husband that they should not come to Linn County to replace Morningstar, and to permit Myers to continue to employ Morningstar. Myers was a strong-willed man who could not be influenced. In order to get his way he told Petitioner to prepare a Will leaving his property to Petitioner. In 1953 Myers had had Petitioner draw a Will where Myers had left his daughter $500.00. Under

the circumstances there was no reason for Petitioner to believe that Myers and his daughter had not had another "falling out". Appendix F.

In addition, when Myers came to Petitioner's office he knew that he had wrongfully stolen from the corporation over $193,000.00, Portion of Report of Temporary Administrator Appendix J.

EC 5-5 states that the lawyer should not suggest that a gift should be made. Petitioner did not suggest to Myers that Myers make a gift to him. The language to EC 5-5 is:

> "Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client." (Emphasis supplied)

The Opinion of the Panel stated that the drafting of the Will violated the Ethical Canon 5-5, Appendix D. That is not the language of the Canon and the Petitioner has at all times contended that under the

circumstances he was not obligated to insist that Myers go to another lawyer.

The Opinion of the Panel of the Eighth Circuit states:

> "In which Myers left his entire estate, conservatively valued at over two million dollars.***"

Then on page 14 the Panel uses language:

> "First, the Question of Property Involved"(Appendix D)

There is no evidence in the record which would warrant a conclusion that Myers was worth even one million dollars.

There were introduced in evidence three financial statements of the corporation. The main corporate asset was land, Myers set the valuation of the land. The Petitioner showed in his Petition for Rehearing En Banc, Appendix F, that the value of Myers interest composed mainly of stock of the closed corporation as of March 14, 1973, could not have been two million dollars in fact probably not one-half of that amount. This would be much less if the amount Myers had wrongfully taken from the corporation had

been taken into consideration. The Myers estate at the time of his death was not worth two million dollars. Exhibit W, Appendix I.

The Panel of the Circuit Court disposes of the ex post facto contentions as to EC 5-5 because the ex post facto concept is only applicable in criminal cases. While Petitioner does not agree that this is the fact, if it were to apply to this Petitioner, standards of conduct which could not fairly have been anticipated and to punish him for violating those standards would be at war with a fundemental concept of the common law that crimes must be defined with appropriate definiteness. Pierce vs. United States, 314 US 306, 311(1941). This Court should act on the premise that lawyers, like all other, are protected by the Fifth and Fourteenth Amendments against punishment except for conduct which has been defined in advance as improper and unethical or is so patently immoral that every reasonable practioner

would know it.

It is settled that penal statutes must give fair notice of what it is which is commanded or forbiden. Connally vs. General Construction Co., 269 US 385(1926); Luryetta vs. New Jersey, 306 US 451(1939); Musser vs. Utah, 333 US 95(1948).

This requirement is violated by a statute too vague on its face, and is violated also when a statute, seemingly narrow and precise, is unforeseeably and retroactively expanded by judicial construction. Boui vs. Columbia, 378 US 347, 352(1964). For almost a century it has been established that disbarring a lawyer from the practice of his profession, though done to protect the public rather than with the intent of punishing the lawyer, has the effect upon him of punishment, and that laws with such an effect must meet the tests applicable to a penal statute. Ex Parte Garland, 4 Wall. 333(1867).

This Court has referred to "the undeniably correct premise that a state may

not arbitrarily refuse a person permission to practice law***,"Cohen vs. Hurley, 366 US 117, 122, 123(1961). To disbar Petitioner would be contrary to that premise.

PETITIONER'S DISBARMENT HAS DENIED HIM DUE PROCESS OF LAW.

PETITIONER WAS ENTITLED TO CLAIM THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS.

The Petitioner sought from the Supreme Court of Iowa permission to conduct discovery which would enable him to discover whether there had been consideration by the Ethics Committee either as to the charge of the violation of EC 5-5 or as to the charge of Conflict of Interest. He was denied this right. Petitioner sought the right to conduct discovery in the United States District Courts for the Northern and Southern Districts of Iowa, this was denied. The Petitioner requested the United States Circuit Court of Appeals for the Eighth Circuit to permit discovery. The Petitioner's Brief in the appeals no. 80-1254 and No.

80-1545 requested the Eighth Circuit Court to appoint a Federal Judge from outside Iowa to furnish the Petitioner a "whole and conplete hearing", this was denied.

Petitioner was further denied due process of law in that he was disbarred by a Panel of the Eighth Circuit consisting of only two sitting judges of the Eighth Circuit. This is contrary to Rule 2 of the Rules of the Court of Appeals for the Eighth Circuit, which provides cases and controversies shall be heard and determined by a Court or a division of not more than three Judges". Rule 15 of the Eighth Circuit provides for the "**disciplining of attorneys shall be as prescribed in Rule 46 of the Federal Rules of Appellate Procedure".

The Rules of Appellate Procedure 46(b) and (c) relate to action by "the court" and not to a Division of the Court. There can be no question that a hearing as to a show cause order is not a "case" or controversy referrred to in Rule 2 of the Eighth Circuit

Rules. Further the showing under a show cause order could not be a controversy, a controversy is definded in Black's Law Dictionary as, "a litigated question; adversary proceeding in a Court of law, a civil action or suit, either at law or in equity; a justiciable dispute". The show cause order and the response thereto could certainly not be a controversy as contemplated by Rule 2 of the Eighth Circuit Rules.

The Petitioner has at all times maintained that he was entitled to a hearing en banc. He requested this at the time the Eighth Circuit consolidated the appeals, this was denied. Appendix E. After the Panel handed down its judgment he petitioned Pro Se for a rehearing en banc, this was denied. Appendix F.

Petitioner has been denied due process of law by the Supreme Court of Iowa, the United States District Courts for the Northern and Southern Districts of Iowa nd by the Eighth Circuit Court of Appeals.

TO DISBAR PETITIONER ON THE GROUNDS OF CONFLICT OF INTEREST IS SO ARBITRARY, THAT BY ACTING ON THIS GROUND THE PETITIONER WAS DENIED DUE PROCESS OF LAW.

There are Constitutional limits on the generally broad control a Court has over those permitted to practice before it. It has been held that "a state may not, under the guise of prohibiting professional misconduct ignore Constitutional rights". National Association for the Advancement of Colored People v. Beiton, 371 US 415, 439 (1963):

> "A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with applicant's fitness or capacity to practice law."

Schware v. Board of Bar Examiners of the State of New Mexico, 353 US 232, 239(1957). For purposes of this rule, there is no Constitutional distinction between denial of admission to the Bar and disbarment. Cohen v. Hurley, 366 US 117, 123(1961). For the

information of the Court the Petitioner has set out in Appendix B, his biographical sketch. Such limitations on states apply a fortiori to a Federal Court when it considers disbarment of one of its attorneys.

The disbarment of the Petitioner because of conflict of interest is most difficult to understand, the language used in the Opinion of the Panel of the Eighth Circuit is strange:

> "The Supreme Court of Iowa also found that Randall's representation of both his own and Myers' corporate interests in the Morningstar land title suit was a conflict of interest in violation of Iowa's Disciplinary Rules 5-101(A) and 5-104(A). The Court based this finding on Randall's suspicions concerning the forged deed involving Myers and Morningstar. We agree with the Supreme Court of Iowa that, in these circumstances, Randall was under a duty to withdraw from representation of Myers's fifty percent interest in the corporation.
>
> We therefore find that Randall's actions with regard to the will and the representation of Myers's corporate interest warrant disbarment from this Court". (Emphasis supplied)

The comment of the Court refers to the Petitioner's representation of the corporation Myers Farms, Inc. in the Morningstar case.

The Grievance Commission found as a fact that Petitioner ceased to represent Myers in October of 1975, appendix G. The Grievance Commission recommended that the Petitioner be disbarred because of his representation of Lovell Myers in the Morningstar suit at the same time he represented his personal interest and the interest of Myers Farms, Inc. This without disclosure and without excuse. That this was a conflict of interest.

The Supreme Court of Iowa apparently being conscious of the fact that until the Supreme Court of Iowa changed the law with respect to the trial of Law issues before Equitable issues(Morningstar vs. Myers 255 NW2d 159(Iowa 1977) the interest of Myers and the Petitioner were identical, appendix F. Therefore it was necessary for the Supreme Court of Iowa to find some other reason to disbar the Petitioner. This is the language:

> "We have said Randall's representation of both his own and Myers's corporate interests in the Morningstar suit was a

conflict of interest. As such it was a violation of DRs 5-101(A) and 5-104(A) interpreting EC 5-1, 5-2, and 5-3."(285 NW2d 161, 165)

This is the language adopted by the Panel of the Circuit Court. Thus the Petitioner has been disbarred from the representation of a corporate entity in which he had a fifty percent interest.

The Supreme Court of Iowa and the Panel of the Eighth Circuit Court of Appeals ignored the charge of EC 5-18; "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stock holder, director, officer, employee, representative, or other person connected with the entity**"

To disbar the Petitioner in the State Courts and the Eighth Circuit is an unjustified arbitrary ground, bearing no rational connection to his fitness or capacity to practice law. While it is true that a professional standard is not to be judged by lay understanding, it is also true that when

a practice from a layman's point of view, runs afoul of a professional standard the burden of justification is on the profession. It is not met by a mere reitertion of a rule." Schwartz, Group Legal Service in Perspective, 12 UCLA L. Rev. 279, 283.

At the time of the death of Myers, February 18, 1976, he was not represented by Petitioner.

The Morningstar case was pending in the Supreme Court of Iowa on an interlocutory appeal by Morningstar from a ruling by Judge Honsel of the Linn County, Iowa, District Court that the quieting title action brought by Myers and the Petitioner against Morningstar should be first tried. That was the Iowa law at that time.

The record reflects the fact that the first time Petitioner was aware that Myers had not had the permission of the Morningstars to sign the deed to the Hess farm, was December 10, 1975, when Myers admitted that he did not have permission in a deposition

taken on that day.

The Iowa State Highway Commission in late 1974, had taken the house in which Myers had lived for over thirty years and the Petitioner had financed the reconstruction and furnishing of another house for Myers. March 19, 1975, Myers wrote a letter of appreciation for what Petitioner had done. A photostatic copy of that letter is Appendix L. Even the Supreme Court of Iowa, who settled everything against Petitioner by saying that he was not truthful, would be hard put to claim that Petitioner financed a new house when he believed that Myers had defrauded him. The disbarment of Petitioner was an arbitrary act of the Court based upon the false premise that there was a conflict of interest.

THE ARBITRARY ACTION OF THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN AND SOUTHERN DISTRICTS OF IOWA AND THE PANEL OF THE EIGHTH CIRCUIT IN DISBARRING THE PETITIONER WITHOUT A DE NOVO REVIEW AND WITHOUT PERMITTING DISCOVERY ENTITLES THE

PETITIONER TO REQUEST THIS COURT TO EXERCISE ITS POWER OF SUPERVISION AS IS PROVIDED BY ITS RULE 17(1)(a).

In Marbury v. Madison Cranch 137, 163, (1803) Chief Justice Marshall observed:

> "The very essence of civil Liberty certainly consists in the right of every individual to claim the protection of the laws when he receives an injury."

Frank Way a professor of political science and chairman of the that department at the University of California, Riverside, in an article in Judicare, April 1981, Issue, Vol. 64, No. 9, p. 390 at page 393, states:

> "The doctrine of absolute judicial immunity is like a fortress protecting judges in everything from good-faith errors to malicious abuse of power;

and at page 395:

> "**, the doctrine of unqualified immunity of judges departs from democratic ideas about accountability for the use of power and from the legal expections that for every legal right there is a legal remedy**"

Rule 17(1)(a) provides that this Court may exercise its supervisiary powers when a federal Court of appeals has sanctioned a

departure by a lower Court from the accepted and usual course of judicial proceedings.

There has been such a departure in this case.

The United States District Court for the Southern District of IOwa refused to permit the Petitioner to conduct discovery and found by a general statement and no facts, that there was support for the conclusion of the Iowa Supreme Court. In substance Judge McManus, without permitting discovery and setting out facts approved the judgment of the Supreme Court of Iowa and disbarred the Petitioner in the Northern District.

Judge Gibson by reading the record and the appendix in the Supreme Court of Iowa was that by amendment to answer, the Petitioner alleged that he did not request Myers to name him beneficiary in his will. That he did not request Myers to name him executor. That that there was no disciplinary rule in effect prohibiting the preperation of the will, there was no notice to Petitioner

that his writing of the will could subject him to disciplinary action. He was deprived of due process. That the attorneys for the Ethics Committee engaged in deception and misconduct depriving Petitioner of procedural due process. That the Ethics Committee's refusal to participate in discovery violated Petitioner's right to due process. That there was no conflict of interest, appendix of Supreme Court of Iowa, p. 21 to p. 29. The appendix in the Supreme Court of Iowa further reflected the fact that Mr. Keith stated in open Court that he would consider matters which were in evidence whether such matters were written, the issues made by the pleadings or not appendix in Supreme Court of Iowa, p. 264-265.

The Complaint against the Petitioner was filed for the purpose of forcing settlement of will contest action, p. 550 appendix in Supreme Court of Iowa. A member of the Grievance Commission before the filing of its finding's had released a story

that their Commission was investigating Petitioner, appendix in Supreme Court of Iowa p. 552.

The Commission further found that the attorney-client relationship between Myers and Petitioner ceased as of October of 1975, Supreme Court of Iowa appendix p. 546. That there was a conflict of interest in representing Myers, appendix in Supreme Court of Iowa p. 551. That the Commission relied upon a 1976 Iowa Supreme Court decision, In re: Frerichs 238 NW2d 764, appendix in Iowa Supreme Court p. 553.

Edward H. Jones, the secretary of the Iowa State Bar Association, read over WMT, a local radio station, portions of the Findings of fact, Conclusions of Law, and Recommendations of the Grievance Commission, appendix in the Supreme Court of Iowa p. 569.

The appendix in the Iowa Supreme Court gives evidence of the bias of the Grievance Commission. Judge Gibson in estimating the value of the Myers estate did not state the

date at which he valued the estate. There was a copy of a financial statement of Myers Farms, Inc. dated June 1, 1972, the evidence showed that Myers signed the financial statement and that the values placed on the assets were placed there by Myers. There was included in the financial statement the Hess farm which was claimed by Morningstar.

Appendix(I) which was Exhibit W, shows that the value of the Myers estate at his death, was $888,000. Judge Gibson clearly misunderstood that the main item of value of the Myers estate was his stock in Myers Farms, Inc. Judge Gibson failed to take into consideration that there was not way in which the value of the stock could be related to the value of the land without extensive legal proceedings. Appendix I describes that would have to be done to enable a tock holder to cash in on the value of the land.

Judge Gibson stated, "The Grievance Commission adopted a neutral stance".

No. 80-1254 and No. 80-1545 on page 27, it is stated, "the Panel members asked 979 questions compared to 1436 questions asked by Gaudineer, Ethics Committee Counsel, and 1583 questions asked by Butler, Counsel for Randall".

The Petitioner has in the Federal Courts sought the right to have a Judge from outside the state of Iowa appointed to conduct full discovery. A lawyer from outside the state of Iowa, with no connections with any of the parties, could act as master.

There is no evidence in the findings or conclusions of either the Northern or Southern United States District Court that either of the Courts had examined the record or appreciated the issues. The Petitioner was disbarred by a Panel of the Eighth Circuit consisting of Judge Gibson, a senior Judge, and two Circuit Court Judges. Judge Gibson clearly misinterpreted the record and did not attempt to consider or discuss the errors of Judge Harris in stating facts

as was pointed out in Appellant's Reply Brief, p. 1.

Perhaps the most compelling reason for calling upon the supervisary powers of this Court relate to the holding of the Panel that "Ethical considerations are more than aspirational and are mandatory.[3]"

The Eighth Circuit is telling the members of its bar that it will discipline for the violation of any one of the 138 Ethical Considerations which it may select. This without any advance notice.

CONCLUSION

The May 11, 1981 issue of US News and World Report in an article, "Why Lawyers are in the Dog House", notes:

> "John D. Randall, a former ABA President, was disbarred for naming himself the beneficiary of a client's

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[3]We are not holding that every violation of an ethical consideration would be grounds for disciplinary action, but are holding that the violation herein involved, being significant and substantial, and having been found by the Iowa Supreme Court to be a basis for disciplinary proceedings, is also thought by us to consitute an appropriate basis for action.

two million dollar estate. He is appealing a finding that he violated conflict-of-interest rules."

There have been many complaints about the Code of Professional Responsibility. The Petitioner was in the House of Delegates of the American Bar Association at the time of the debate on the Code, it is his sincere belief that if the members of the House of Delegates had believed that a lawyer could be disciplined for the violation of an Ethical Consideration, it would have been necessary to have amended the Code before it would have been adopted.

The Code is being studied by the Kutak Committee and the present Code is to be replaced.

A Writ of Certiorari should be issued in this case that this Court may outline for the American lawyer reasonable guidelines as to the bounds of permissable conduct in the practice of law and the necessity of definite

rules so that the Constitutional rights of lawyers as a class may be preserved.

Respectfully submitted,

JOHN D. RANDALL, SR.
PRO SE